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No. 92-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN O. IRVINE and
FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF ESTATE OF HELEN W. HALBACH, LOIS W. POINIER, EXECUTRIX, AND THE TRANSFEREES OF MRS. HALBACH'S DISCLAIMER, LOIS W. POINIER AND W. PAGE WODELL, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST AND RULE 37 COMPLIANCE

This brief of *amici curiae* is being filed pursuant to Rule 37 of the Supreme Court Rules of Practice and Procedure on behalf of the Estate of Helen W. Halbach, Lois W. Poinier, Executrix, and the Transferees of the assets disclaimed by Mrs. Halbach, Lois W. Poinier and W. Page Wodell. The Halbach Estate has litigated with Petitioner the issue of when a disclaimer of a trust remainder interest is timely, so as to avoid imposition of federal gift tax. *See Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978), and 40 T.C.M. 952 (1980). Although the Estate's rights to challenge the imposition of tax have expired, the undersigned counsel for the amici is an

experienced practitioner in this field and has advised many clients about disclaimers and estate tax and gift tax issues, and thus has an interest in seeing that the issue raised in this case is decided properly due to the impact it may have on future cases. *See, e.g., Poinier v. Commissioner*, 86 T.C. 478 (1986), *aff'd*, 858 F.2d 917 (3d Cir. 1988), *cert. denied*, 490 U.S. 1019 (1989). In addition, the undersigned commenced an action under The Freedom of Information Act against the Internal Revenue Service to order the production of certain agency records relating to the history of Treas. Reg. § 25.2511-1(c). *O'Connor v. Internal Revenue Service*, File No. 80-0495 (U.S. District Court for the District of Columbia). Copies of written consents by both parties to the filing of this brief have been filed with the Office of the Clerk of the Supreme Court.

SUMMARY OF ARGUMENT

Jewett v. Commissioner, 455 U.S. 305 (1982), should be reconsidered because the majority opinion in that case rests upon erroneous facts concerning the history of the Treasury Regulation at issue, Treas. Reg. § 25.2511-1(c), and the Commissioner's interpretation of that Regulation. Several very significant documents were not before the Court in *Jewett*, and they shake the fundamental underpinnings of the majority opinion. These documents show: (1) the Regulation, contrary to the conclusion stated in the majority opinion, 455 U.S. at 315-16, was intended to codify the rule set forth in *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), and properly capture the distinction, based on differences in applicable state property law, between the results in *Brown* and in *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952), and was not intended to impose a new federal "reasonable time" standard for disclaimers; (2) the Internal Revenue

Service, which had followed the *Brown* and *Hardenbergh* rules, considered issuing a proposed 1956 Revenue Ruling which would have deviated from the *Brown* rule, and determined that a change, if any, should be applied only prospectively; and (3) contrary to the representation of the counsel for the Commissioner during the oral argument in *Jewett* that the Commissioner had consistently interpreted and applied the Regulation and the majority opinion's reliance on that representation, 455 U.S. at 318, the Commissioner has most emphatically not consistently applied the Regulation, and in fact in 1966 allowed a taxpayer, who had knowledge of an income interest in a trust for many years, to disclaim that interest free of gift tax.

A reexamination of *Jewett* is essential in light of these newly discovered documents. If this Court does not arffirm the judgment of the *en banc* court of Appeals on the first two grounds urged by Respondents, amici respectfully assert that, for the reasons asserted by the petitioner in *Jewett* and the dissenting opinion in that case, and for the reasons asserted by the Respondents in this case, *Jewett* was wrongly decided and should be overruled.

CASE LAW AND REGULATORY BACKGROUND

For many years, the established gift tax disclaimer rule was that a disclaimer valid, timely, and effective under local property law was effective for federal gift tax purposes. This rule had its genesis in the *Brown* case, decided by the United States Court of Appeals for the Sixth Circuit in 1933. The Sixth Circuit reasoned that there was no requirement under Ohio law that a disclaimer be made within any particular period of time to be valid, so long as it was made before an actual distribution of property to the disclaimant. That court then held that the disclaimer therein was valid under

Ohio law, that the disclaimer simply constituted the exercise of a right to reject receipt of property rather than the transfer of property, and that the disclaimer therefore was not a "transfer" for Federal estate tax purposes.1/ Subsequent to *Brown*, the Internal Revenue Service never publicly disagreed with that decision.

No other decision bearing upon this issue arose from 1933 until 1952, when the Eighth Circuit decided *Hardenbergh*. The decedent in *Hardenbergh* had died intestate, and, under Minnesota law, the property vested in the heirs immediately upon the death of the decedent. In *Hardenbergh*, the Eighth Circuit followed the *Brown* rule and determined whether the disclaimer at issue was to be treated as a transfer of property for federal gift tax purposes by looking to state property law. Because Minnesota law did not recognize disclaimers of intestate interests which had immediately vested, the Eighth Circuit accordingly held that an effective disclaimer could not be made of such interest for federal gift tax purposes. *Hardenbergh* thus followed *Brown*, but carefully distinguished it on the basis of the testate-intestate state law difference. 198 F.2d 66.

The Internal Revenue Service (then known as the Bureau of Internal Revenue) frequently considered the disclaimer issue after 1952 in connection with several proposed revenue rulings, proposed Treasury regulations and the final Treasury Regulation issued in 1958. This Court was apprised of some of that material in the *Jewett* case, in an amicus brief submitted by the undersigned, based upon the government's response to a Freedom of Information Act Request I had made. However, several

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1/ The federal estate and gift taxes are *in pari materia* and must be construed together, *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939), and the concept of "transfer" has been interpreted in the same manner under each tax. *See, e.g., Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978).

very significant documents and Service comments were not before the Court in *Jewett*. These materials recently and inexplicably first became available during this litigation, well after 1982.

The first of these documents is a General Counsel Memorandum ("G.C.M.")2/ in which the Office of the Chief Counsel of the Service discussed the federal gift tax rules applicable to disclaimers at length. *See* Appendix 1 (G.C.M. 27626 dated Jan. 15, 1953). The G.C.M., after agreeing with a proposed ruling letter's conclusion that the Service not continue in its efforts to assert gift tax liability in that case, recommended that the proposed ruling be revised to set forth the Chief Counsel's reasoning, as follows:

> The estate and gift tax provisions of the [Internal Revenue] Code do not contemplate the taxing of testamentary gifts by renunciation. *Brown v. Routzahn*, 63 F.(2d) 914, (CA-6,1933), cert. denied, 290 U.S. 641. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject. *Brown v. Routzahn, supra*. When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation, the devise never takes effect, title never vests in the devisee, and such renunciation is effective as of the date of the death of the testator. *Perkins v. Isely*, [32 S.E.2d 588 (N.C. 1945)].

2/ G.C.M.s are widely circulated throughout the Service as statements of general policy. *Taxation with Representation Fund v. Internal Revenue Service*, 646 F.2d 666, 669-71 (D.C. Cir. 1981).

The Commissioner's position was thus that beneficiaries hold the "right" to accept or reject a gift of property, the *Brown* rule governed and disclaimers that satisfied state property law requirements would be effective for federal gift tax purposes. Significantly, the G.C.M. does not mention an independent federal "reasonable time" standard at all.

The second of these documents is an unnumbered G.C.M. issued three years later. *See* Appendix 2 (unnumbered G.C.M. dated May 2, 1956). In that document, the Chief Counsel commented on a proposed change of the Commissioner's position in a draft Revenue Ruling on the gift tax treatment of disclaimers, which the Commissioner was considering for publication. The proposed Ruling would have resulted in a reversal of the Commissioner's acceptance of the *Brown* rule by treating *all* disclaimers as subject to federal gift tax. *See* Appendix 6. But the Chief Counsel rejected this and made clear that the gift tax treatment at that time depended solely on state law. The Chief Counsel further directed the Assistant Commissioner to delete prefatory language in the proposed Ruling stating, "Since this Ruling represents a change in policy." The Chief Counsel reasoned that reference to a "change in policy" would make it appear that the Service "discriminated against *Hardenbergh* and [*William L. Maxwell*, 17 T.C. 1589 (1952)] by asserting a gift tax against them several years prior to its adoption of the position it successfully argued in their cases." This document indicates that the Service rested solidly on *Brown* and that any change in the Service's position would be given only prospective effect.

The third of these documents is a December 1956 memorandum from the Commissioner to the Secretary of the Treasury concerning proposed gift tax regulations. *See* Appendix 3. In that memorandum, the Commissioner acknowledged that the 1954 Code "made comparatively few changes in the gift tax area." However, the

Commissioner felt that "it presented an opportunity for a general revision of existing regulations which are of long standing and which are subject to clarification and elaboration in various areas." The memorandum then listed and summarized the "major changes." No mention at all was made concerning disclaimers.

These new documents place the documents that were before the Court in *Jewett* in an entirely different light. A May 25, 1956 transmittal memorandum[3/] for a proposed Revenue Ruling (probably the same one discussed in the unnumbered G.C.M.), *see* Appendix 5, states that, since the Ruling involved Section 7805(b) of the Internal Revenue Code, which allows the Commissioner to make rules and regulations prospective only in effect, the Commissioner had to approve it for publication personally, and the memorandum states that it accordingly had to be cleared with the Technical Planning Division before it could be resubmitted to the Commissioner for approval.

The proposed Ruling itself, *see* Appendix 6, did not mention a "reasonable time" standard but proposed that any renunciation of an inheritance or legacy under a will constitutes a taxable "transfer" for gift tax purposes, regardless of property law title considerations. The Ruling states, however:

> [U]nder the authority contained in Section 7805(b) of the Internal Revenue Code of 1954, the *ruling set forth herein will not be applied retroactively* with respect to such renunciation which became absolute and

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3/ This and the other materials described below come from the Treasury Department file for the Regulation in issue, which were obtained under a Freedom of Information Act request made by the undersigned. *See* Appendix 4.

irrevocable prior to _____, the date of this Bulletin.

Appendix 6 (emphasis added).

This proposed Ruling was "inconsistent" with a regulation then being drafted under the 1954 Internal Revenue Code, which put the Service in a "peculiar position." *See* Appendix 7 (Handwritten note of Erskine H. Hatfield). Accordingly, the Service determined to withhold publication of the Ruling pending promulgation of the final gift tax regulations, and explained the reasons for this determination in a detailed and lengthy memorandum. *See* Appendix 8. (In fact, the proposed Ruling never was issued.) In particular, the Service noted its lengthy history of following the *Brown* and *Hardenbergh* rules and the potential unfairness in changing its position, and inserted language in the proposed gift tax regulations "adopting the rules in these two court decisions." *See* Appendix 8. This memorandum was written sometime between May 25, 1956, *see* Appendix 7, and October 11, 1957, when the final version of the memorandum (which omitted most of the substantive comments contained above) was typed. *See* Appendix 9. A member of the Service's Legislation and Regulations Division, Office of Chief Counsel, who listed changes to be made in the final draft of the regulation, stated, "the renunciation rule should not depend on testacy v. intestacy," another indication that the Service's proposed regulation was codifying the *Brown* and *Hardenbergh* rules, not adopting a new federal timeliness standard. *See* Appendix 10.

The Commissioner's final official analysis of the disclaimer regulation, set forth in a Technical Memorandum dated October 1, 1958, also confirms that the regulation was "intended to be the application of the rules in [*Brown*] and [*Hardenbergh*]". *See* Appendix 11 (full citations omitted). After it received protests, the

Service "reconsidered [its] position and now believe that the proper distinction between these two court cases *turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property* which passed from the decedent." *See* Appendix 11 (emphasis added). In addition, the Service "abandoned the position that a partial renunciation cannot be made, and [the Regulation] has been further changed to recognize a partial renunciation *where it is effective, as such, under local law.*" *See* Appendix 11 (emphasis added). As set forth below, I believe that all of these documents demonstrate that the Regulation was intended to codify *Brown* and *Hardenbergh* and not impose a new "reasonable time" standard.

The most significant document not before the Court in *Jewett* is a private letter ruling issued on December 20, 1966. *See* Appendix 12 (Private Letter Ruling 6612201590A). In that letter ruling, the Commissioner allowed a taxpayer, who had knowledge of her income interest in a trust for many years, to disclaim an additional income interest free of gift tax. The Service issued no known rulings at all, of which the tax bar is aware, concerning a disclaimer of a future interest in a trust, and certainly no adverse rulings, before it issued this 1966 ruling. This is powerful evidence that the Commissioner has not consistently interpreted and applied the Regulation, and it discredits the representation made to this Court in *Jewett* by counsel for the Commissioner.

ARGUMENT

If the Commission's interpretation of Treasury Regulation § 25.2511-l(c) is deemed by this Court to apply to Mrs. Irvine's Disclaimer, and if this Court is considering whether to apply *Jewett* to her Disclaimer, it is respectfully submitted that the *Jewett* decision should

be carefully reconsidered and overruled for several reasons.

First, the centerpiece of the majority opinion in *Jewett* is its conclusion that the Regulation imposed a two-part test for a valid disclaimer, including whether the disclaimer was valid under state law and whether a new federal timeliness standard was satisfied. 455 U.S. at 310-11. The majority found the Regulation ambiguous and looked to the history of the Regulation in reaching this conclusion. But the complete history of the Regulation, which was not before the Court in *Jewett*, shows that the Commissioner intended only to codify the *Brown* rule.

The newly discovered private letter ruling and G.C.M., Appendices 1 and 2, show that the Service adhered to and accepted *Brown* as governing law. The G.C.M. confirms that the Service, at the very time it was circulating the proposed Regulation internally, was concerned about any change in policy and would have made any change reversing the *Brown* rule only prospective. These facts lend powerful additional importance to the Service's repeated comments that the proposed Regulation was intended only to codify the long-accepted rule of *Brown*. The Service's decision to eliminate the testacy-intestacy distinction found in the proposed Regulation was based on its recognition that *Hardenbergh* merely applied the *Brown* rule, further confirmation that the final Regulation codified *Brown*. *See* Appendices 8, 10, 11.

These newly discovered documents, read in conjunction with the other documents concerning the history of the Regulation, also show that the speculation in *Jewett* that a separate "federal timeliness requirement was added in response to the particular facts presented by [*Brown*], in which the taxpayer waited eight years to renounce the interest and did so when he was 72 years old," 455 U.S. at 316 n. 17, is unsupported. Rather, the Service fully accepted *Brown* as the governing rule and

recognized that *Brown* required only that a disclaimer be effective under state law to be effective for federal gift tax purposes.

The Regulation itself repeats the "local law" requirement, unencumbered by any additional "reasonable time" requirement, many times. Only once does it even mention that, "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer," Treas. Reg. § 25.2511-1(c), but that comment is immediately followed by the requirement that "the refusal must be unequivocable [sic] and effective under the local law." The reading of the Regulation by *Jewett*'s majority focuses improperly on a single comment and elevates it to a new federal standard.4/ The Service certainly did not think it was imposing a new requirement when it drafted the Regulation; rather, it was trying to codify *Brown* and *Hardenbergh*, which made the effectiveness of disclaimers for federal gift tax purposes hinge directly and solely on state property law. The thrust of *Jewett* -- that a new federal timeliness requirement was added by the Regulation -- is thoroughly defeated by the complete history of the Regulation that is now available to the Court.

Second, the majority in *Jewett* also relied upon the fact that " [t]he Commissioner's interpretation of the regulation has been consistent over the years and is entitled to respect." 455 U.S. at 318. The majority found this fact to be a "canon of construction . . . even more

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4/ To the extent the Regulation does impose any "reasonable time" requirement, courts should look to relevant state law in giving content to that requirement, *see, e.g., Keinath v. Commissioner*, 480 F.2d 57, 61-62 (8th Cir. 1973), and, even if the Commissioner has imposed such a new requirement, it should be given only prospective effect. *See infra* at 16-17; *see also* Appendix 2.

forceful when applied to the Commissioner's interpretation of his own regulation." *Id.* (citation omitted). It based its conclusion upon a representation made before this Court during the oral argument by the counsel for the Commissioner that the Regulation had been consistently interpreted and applied.5/

The representation by the Commissioner's counsel and the resulting majority conclusion are demonstrably wrong. The Commissioner in fact in 1966 allowed a taxpayer with knowledge for many years of an income interest in an irrevocable trust to disclaim a portion of her interest free of gift tax. The Service had not previously addressed the issue at all, but in the 1966 ruling, the settlor

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5/ QUESTION: Mr. Smith, when was it first made as clear as can be that the regulation means or meant what you now say it means?

* * *

QUESTION: Well, do you think you've answered my question or not?

* * *

QUESTION: But the first part of my question was when did it become perfectly clear that the Commissioner administered the regulation the way he is now administering it?

MR. SMITH: I can't answer that question because of the paucity of cases. I suppose it became perfectly, absolutely clear with authority when the Tax Court decided the Keinath case * * *

* * *

QUESTION: *At least the Commissioner didn't change his mind.*

MR. SMITH: *Absolutely not.*

Appendix 13 (Transcript of oral argument in *Jewett*), pp. 43-45 (emphasis added).

of the trust6/ had established an inter vivos irrevocable trust on December 7, 1933. Net income was payable to his daughter during her life. The daughter died on January 4, 1936, survived by four children, all of whom received one-quarter of the trust's income from 1936 on. One son died on April 17, 1963, the other died on March 16, 1964, and each son was survived by an adopted son, which raised the question whether an adopted child qualified as "issue" so as to be able to receive income under the trust. The Supreme Court of Pennsylvania ruled, in 1966, that the adopted sons were not entitled to benefits under the trust. This ruling had the effect of increasing the income interest to which the surviving daughters were entitled following their brothers' deaths.

After that decision, one of the daughters advised the trustee that she wished to disclaim her interest in the trust. The Service, in Private Letter Ruling 6612201590A, issued December 20, 1966, stated:

> [T]axpayer's proposed renunciation will not result in a taxable transfer of that interest for gift tax purposes to her natural children if such renunciation is executed within a "reasonable time" *from the time that she first received notice of the right to the additional income interest*. If the *proposed* execution is executed at the *present* time, the execution would be effected within a "reasonable time" . . .

See Appendix 12 (emphasis added).

6/ The Pennsylvania Supreme Court opinion referred to in the Ruling yields additional information about the transaction in question (including such things as the settlor's name). *See Fownes Trust*, 421 Pa. 476 (1966); *In Re Deed of Trust of Henry C. Fownes*, 465 Pa. 182 (1975).

This disclaimant clearly knew for at least thirty years that she was a beneficiary under the trust as she had been receiving income from it since 1936, she knew of the interests held by her sister and brothers in the same trust, and she had been given notice of the prior four accountings under the trust.7/ She undoubtedly knew for many years of her contingent right to an additional income interest should one or both of her brothers die without issue. It is absolutely clear that she knew about her contingent interest to additional income upon the death of her brothers (and in fact litigated the issue over the adopted children to the Supreme Court of Pennsylvania so she would become entitled to that interest) for *over three years* before she disclaimed it, from the commencement of litigation in October 1963 to the Pennsylvania Supreme Court's decision on December 20, 1966. Nevertheless, the Commissioner held that the reasonable time period did not begin until the decision of the Pennsylvania court determining that the additional income interest in the trust would not go to the adopted sons of her brothers.

The facts surrounding the 1966 Letter Ruling made quite clear that the disclaimant exercised "control" over the property that she disclaimed, within the interpretation of "control" of the majority opinion of this Court in *Jewett*. After the Pennsylvania Supreme Court's decision became final, and thus after the disclaimant was sure under that decision how the property that she disclaimed would pass, the disclaimant executed her disclaimer. This is exactly the type of "wait and see", exercise of control planning which the Tax Court and this Court's majority opinion admonished against in *Jewett*.

7/ If the position the Commissioner took in *Jewett* applied here, she would have been required to disclaim her interest, at the latest, within a short time after 1936.

See 455 U.S. at 318-319. The Commissioner, in the 1966 Letter Ruling recognized, however, as did the dissent in *Jewett*, that "[t]here is nothing unfair or improper," *id.* at 325, in waiting until the Pennsylvania court decision was rendered and then to decide whether to accept or reject the additional income interest.

The implications of this ruling are accordingly enormous. How could the Commissioner have contended before this Court that the Regulation had been consistently applied? How can the Commissioner argue that a Regulation like this, and the Commissioner's interpretation of that Regulation, ought to be given deference and respect by the courts? How can the Commissioner even suggest, as he did in the briefing before this Court in *Jewett*,[8/] that a disclaimer made shortly after the 1958 Regulation change would have been more defensible, since that argument assumes that the Regulation was clear enough to put taxpayers on notice that the standard had changed to what the Commissioner now says it is? The 1966 Letter Ruling shows that the Commissioner's position under this Regulation has been inconsistent and unfair to taxpayers. When the Commissioner has interpreted a Regulation inconsistently, or when his interpretation is contrary to all prior interpretations, his interpretation is entitled to no weight. *Rowan Cos. v. United States*, 452 U.S. 247, 261-63 (1981). And it leaves *Jewett*, which found the Commissioner's allegedly consistent interpretation of the Regulation "forceful," unsupported.

Third, the complete history and the ambiguity of the Regulation, coupled with the Service's own inconsistency in interpreting the Regulation, demonstrate that the Commissioner's failure to apply the Regulation

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8/ Brief for the I.R.S. at 38-39, *Jewett v. Commissioner*, 455 U.S. 305 (1982).

with only prospective effect constitutes an abuse of his discretion under Section 7805(b) of the Code. That Section states, "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive *effect*" (emphasis added). In Section 7805(b), Congress "confirmed the authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively, but empowered him, in his discretion, to *limit retroactive application to the extent necessary to avoid inequitable results*." *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 184 (1957) (emphasis added; reference omitted).

The history of the Regulation now available to the Court makes clear that the Commissioner, at the time the Regulation was drafted, intended that any new rule that differed from *Brown* be only prospective in effect. Any new interpretation of the Regulation, whether caused by *Jewett* or by the Commissioner's failure to draft the Regulation so as to make clear he only intended to codify *Brown*, should also be only prospective in effect. By construing the Regulation as he has in *Jewett* and in this case, contrary to the intent of the drafters of the Regulation and contrary to his construction in 1966 for at least one taxpayer with a pre-existing interest, the Commissioner has abused his discretion in violation of Section 7805(b). The fact that the Commissioner apparently did not appreciate in 1958 that the Regulation changed the law certainly does not excuse a failure to avoid arbitrarily changing the law for holders of pre-existing interests. The *Jewett* majority opinion dismissed the retroactivity argument on the basis that a "right" to disclaim free of tax was not established by *Jewett*, but that reading ignores the Service's lengthy prior acceptance of *Brown* and the injustice of how this change in the law was handled; if one accepts that the law should not be changed in the middle of the game, without even notifying the players of the change, then that is sufficient

to invoke Section 7805(b) under the authorities cited above, because Section 7805(b) was intended to "avoid inequitable results." 9/

A holder of an interest from 1931, when *Brown* was first decided in the district court, through November 15, 1958, could reasonably and correctly have believed that a disclaimer of such interest permitted under state law would not incur a federal estate or gift tax. It was reasonable for taxpayers to have relied on *Brown* and to have structured their affairs accordingly. The Commissioner has unilaterally changed the rules in the middle of the game for holders of interests created before 1958, contrary to any reasonable notion of equity or justice. The application of the Commissioner's present interpretation of the Regulation to disclaimers of pre-1958 interests is unfair and constitutes an abuse of the Commissioner's discretion under Section 7805(b).

Finally, the Regulation is merely an "interpretative" regulation that, given the circumstances set forth above, is entitled to little, if any weight. This Court has stated that:

> The weight of such [informed administrative interpretative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control.

9/ Furthermore, even the Commissioner realized during the course of preparation of the Regulation that relief was appropriate under Section 7805(b), as evidenced by the invoking of such relief by a proposed Revenue Ruling. *See* Appendix 6.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *accord, Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Daughters of Miriam Ctr. for the Aged v. Mathews*, 590 F.2d 1250, 1258, 1263 (3d Cir. 1978). These cases make clear that the taking of an inconsistent position by an administrative agency severely undercuts the weight to be given to an interpretative regulation; indeed, inconsistency appears to be the primary factor to be weighed in this regard. The Commissioner was *completely inconsistent* in the 1966 Letter Ruling with his present litigation position. And the Commissioner was obviously inconsistent in the Regulation, if it has the meaning this Court accepted in *Jewett*, with his prior position of following *Brown*. In addition, that Regulation was inept in its attempt to codify *Brown*, as the litigation which has resulted demonstrates. Thus, although Treasury regulations generally are given consideration and weight by the courts, given the unusual circumstances surrounding this Regulation, and in particular the 1966 Letter Ruling, the Regulation is entitled to no weight.

The Service itself has perhaps said it best:

> [T]he taxpayer should be entitled to know what position the Service is going to take on a given set of facts and circumstances. Otherwise, he is compelled to proceed in something of a blind fashion, not being able to determine the tax consequences *primarily by reason of the fact that a state of irresolution has been wrought upon him by the Service.*

G.C.M. 32894 (August 10, 1964) (emphasis added) (not publicly available at the time *Jewett* was decided).

It is insufficient to say that the Regulation applies only to disclaimers made after 1958, rather than disclaimers of interests created after 1958, since under the Commissioner's present interpretation of the Regulation holders of pre-1958 interests were unfairly and unjustifiably prevented from ever disclaiming without incurring a gift tax, once the Regulation had been promulgated. Congress recognized this very distinction when it made Section 2518 applicable only to disclaimers of interests created after 1976; that Section is inapplicable to disclaimers made after 1976 of interests created before 1977. *See* Section 2009(e) of the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520. Only the approach taken by Congress effects a change in disclaimer tax law without adversely affecting prior transactions undertaken in reliance upon then-existing law. *Cf. United States v. Byrum*, 408 U.S. 125, 134-135 (1972).

The taxability of pre-1976 interest disclaimers should be decided under the rule of *Brown*, as the drafters of the 1958 Regulation intended. *See* Appendices 8, 10, 11. This is one of the infrequent turning points in the evolution of an issue where a bold, critical reevaluation of position by this Court makes sense. Even more, justice would be rendered.

CONCLUSION

Amici respectfully submit that, if this Court does not affirm the judgment of the Eighth Circuit *en banc* on the first two grounds set forth by Respondents, this Court

should reconsider and overrule *Jewett* for the reasons set forth above.

Dated: September 2, 1993 Respectfully submitted,

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